COMMONWEALTH OF KENTUCKY
SUPREME COURT
2014-SC-000354-D
2014-SC-000357-D

PHILADELPHIA INDEMNITY INSURANCE COMPANY, INC. APPELLANTS
and
ENCOMPASS INDEMNITY COMPANY

APPEAL FROM THE KENTUCKY COURT OF APPEALS
CASE NO. 2013-CA-001275
VS. **ON APPEAL FROM JEFFERSON CIRCUIT COURT**
HONORABLE CHARLES L. CUNNINGHAM
CIVIL ACTION NO. 12-CI-04231

RICHARD R. TRYON APPELLEE

BRIEF FOR *AMICUS CURIAE,* KENTUCKY DEFENSE COUNSEL, INC.

Certificate Required by CR 76.12(6)

I hereby certify that on this 5th of June, 2015, ten (10) originals of this brief were served via U.S. Postal Service Registered Mail upon **Clerk, Kentucky Supreme Court**, Room 235, 700 Capital Ave., Frankfort, KY 40601-3415, with one (1) copy served by regular mail upon each of the following: **Clerk, Kentucky Court Of Appeals,** 360 Democrat Drive, Frankfort, KY 40601; **Hon. Charles L. Cunningham,** Judge, Jefferson Circuit Court, 700 West Jefferson Street, Suite 703, Louisville, KY 40202; **William B. Orberson/Patricia LeMeur,** Phillips, Parker, Orberson, & Arnett, PLC, 716 West Main Street, Suite 300, Louisville, KY 40202; **Robert E. Stopher/Robert D. Bobrow**, Boehl Stopher & Graves, 400 West Market Street, Suite 2300, Louisville, KY 40202; and **A. Thomas Johnson**, 304 West Liberty Street, Louisville, KY 40202. It is hereby further certified that the record on appeal was not withdrawn by Counsel for *Amicus Curiae.*

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INTRODUCTION

This is a case involving the construction of a policy provision regarding Underinsured Motorist Insurance ("UIM") coverage for a motorcycle owned by the insured but not scheduled for coverage under the owner's policy. The trial court granted summary judgment to the Appellants Philadelphia Indemnity Insurance Company, Inc. ("Philadelphia"), and Appellant Encompass Indemnity Company ("Encompass"), based upon an exclusion within the policies of insurance commonly referred to as the "owned but not scheduled for coverage" exclusion. The Court of Appeals reversed the summary judgment entered by the Jefferson Circuit Court after determining that the "owned but not scheduled for coverage exclusion" exclusions contained in the policies of insurance were void as against public policy. This Court granted Philadelphia's and Encompass' Motion for Discretionary Review.

As stated in the Introduction of Appellant Encompass' Brief, "[t]he specific issue is whether a narrow limitation on UIM coverage provided under an insured's automobile policy – precluding UIM coverage for the insured's use of a vehicle which he owns or which is regularly available to him – is enforceable with respect to the insured's use of an unscheduled motorcycle."

PURPOSE AND INTEREST OF *AMICUS CURIAE*

Kentucky Defense Counsel, Inc. ("KDC") is an organization of civil defense litigators licensed in Kentucky that was organized, *inter alia*, to assist in improving the administration of justice in Kentucky courts. KDC members regularly represent members in defense of UIM claims who have included in their automobile insurance policies the same or substantially similar exclusionary language related to a claim for UIM coverage as the exclusions utilized by Philadelphia and Encompass at issue in the present matter.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Amicus Curiae KDC adopts herein by reference the Statement of the Case contained in the Briefs of Appellant Encompass and Appellant Philadelphia which, based upon information and belief, accurately reflects the record.

ARGUMENT

At the time of his motorcycle accident in July 2012, Appellee Richard Tryon ("Tryon") was operating a 2009 Yamaha Motorcycle. Tryon also owned a 2004 Lexus insured with Encompass and a 1996 Pontiac Firebird insured with Philadelphia. Despite only insuring his motorcycle with Nationwide, he attempted to collect UIM from both Philadelphia and Encompass. The trial court granted summary judgment to Philadelphia and Encompass based upon an exclusionary clause in each company's policy of insurance. The trial court determined that Tryon was unable to recover UIM because each policy contained an "owned but not scheduled for coverage" exclusion. The trial court relied upon and applied the reasoning from *Motorists Mut. Ins. Co. v. Hartley*, No. 2010-CA-000202-MR (Ky. App. Feb 11, 2011) (review denied and opinion ordered unpublished Ky. Feb 12, 2012). The Court of Appeals reversed, determining that the "owned but not scheduled for coverage" exclusion was invalid and unenforceable as against public policy.

I. The "Owned but Not Scheduled for Coverage" Exclusion is Not Against Public Policy Pursuant to *Hodgkiss-Warrick* and is Valid and Enforceable

The policy provision in question in this matter relates to UIM coverage. It is well settled in Kentucky that "[UIM] coverage is optional, rather than mandatory, according to KRS 304.39-320." *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247-48 (Ky. 1992). This Court has held that an "exclusionary clause in an insurance contract which reduces below minimum or eliminates [statutorily required] coverages effectively renders a driver uninsured to the extent of the reduction

or elimination [and] [b]ecause the stated purpose of the MVRA is to assure that a driver be insured to a minimum level, such an exclusion provision contravenes the purpose and policy of the compulsory insurance act." *Bishop v. Allstate Ins. Co.*, 623 S.W.2d 865, 866 (Ky. 1981). However, the same public policy argument is ineffective with regard to exclusionary clauses which reduce or limit statutorily optional coverages such as underinsured motorist benefits.

Specifically, this Court in *State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875 (Ky. 2013), noted that "it is clear that while underinsured motorist coverage must be made available if requested, such coverage is optional in Kentucky and may be waived by the insured." *Hodgkiss-Warrick* at 881. "The coverage that must be made available, moreover, may be **limited** by terms and conditions not inconsistent with the remainder of KRS 304.39-320." *Id.* (emphasis supplied). "[W]hile the statute serves the remedial purpose of protecting auto-accident victims from underinsured motorists who cannot adequately compensate them for their injuries, that purpose has not been raised to the level of a public policy overriding other purposes of the MVRA, such as guaranteeing the continued availability of affordable motor vehicle insurance, or overriding all other considerations of contract construction. KRS 304.39-010." *Id.*

In *Hodgkiss-Warrick*, Ms. Hodgkiss-Warrick sought UIM recovery from her policy of insurance with State Farm when she was injured as a passenger in her daughter's motor vehicle. *Id.* at 876-877. Ms. Hodgkiss-Warrick's daughter resided with her at the time of the accident and was a "resident relative" under the terms of Ms. Hodgkiss-Warrick's policy of insurance. *Id.* Ms. Hodgkiss-Warrick's policy of insurance contained an exclusion to UIM coverage commonly referred to as the "owned by or available for regular use" exclusion which precluded recovery of UIM while occupying a vehicle that was owned by or available for the regular use of a resident relative. *Hodgkiss-Warrick* at 876-877. "[T]he trial court concluded that Hodgkiss–Warrick was

not entitled to underinsured motorist coverage because her policy disallowed coverage when she was injured in an underinsured vehicle owned or regularly used by a 'resident relative.'" *Id.* at 876. On appeal, "[t]he Court of Appeals acknowledged that Pennsylvania law applies but found a recent 'shift' in Kentucky public policy that would prohibit enforcement of a policy provision that disallows UIM coverage when the insured is injured in a vehicle owned or regularly used by a relative with whom the insured resides." *Id.* at 877. This Court determined the exclusion was not against public policy and was therefore enforceable, stating "contrary to the appellate panel's surmise about Kentucky public policy, there is no prohibition on the type of UIM exclusion at issue here, an exclusion expressly approved by this Court in *Motorists Mut. Ins. Co. v. Glass,* 996 S.W.2d 437 (1999)". *Id.* at 877.

In addition to *Hodgkiss-Warrick*, various Kentucky Courts have held that, in statutes providing for optional vehicle coverages such as UIM, the statutory allowance for terms and conditions permits exclusions from coverage. *See Preferred Risk Mut. Ins. Co. v. Oliver*, 551 S.W.2d 574 (Ky. 1977); *Windham v. Cunningham*, 902 S.W.2d 838 (Ky. App. 1995); *Pridham v. State Farm Mut. Ins. Co.*, 903 S.W.2d 909 (Ky. App. 1995); *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky. 1999); *Baxter v. Safeco Ins. Co. of America*, 46 S.W.3d 577 (Ky. App. 2001); *Murphy v. Kentucky Farm Bureau Mut. Ins. Co.*, 116 S.W.3d 500 (Ky. App. 2002); *Burton v. Kentucky Farm Bureau Mut. Ins. Co.*, 326 S.W.3d 474 (Ky. App. 2004); *Edwards v. Carlisle*, 179 S.W.3d 257 (Ky. App. 2004); *Murphy v. Kentucky Farm Bureau*, 116 S.W.3d 500 (Ky. App. 2002); and *Arguelles v. Nationwide Investment Services Corp.*, No. 2012-CA-000459-MR, 2013 WL 1384922 (Ky. App. April 5, 2013).

The same public policy considerations that were present in *Hodgkiss-Warrick* as it applied to the "owned by or available for the regular use" exclusion as well as the litany of other decisions

cited above allowing for UIM coverage to be limited by the terms and conditions of the policy of insurance are present here as it applies to the "owned but not scheduled for coverage" exclusion. Those decisions are no different than the clear and unambiguous exclusion herein.

As discussed in *Hodgkiss-Warrick*, the public policy rationale for voiding the exclusion is not present:

> The "public policy" Hodgkiss–Warrick would have us apply does not meet this standard. Indeed, although Hodgkiss–Warrick refers broadly to our Motor Vehicle Reparations Act (MVRA), KRS 304.39–010 *et seq.*, as somehow implying the "policies" upon which she relies, neither she nor the Court of Appeals panel has identified any specific provision of the MVRA as forbidding the sort of exclusion from underinsured motor vehicle coverage at issue here. In fact, the plain language of the MVRA and our case law precedent are to the contrary.
>
> While the MVRA mandates that Kentucky motorists have minimum liability coverage, KRS 304.39–100 and .39–110, the MVRA unequivocally provides that underinsured motorist coverage is optional.
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> ...
>
> it is clear that while underinsured motorist coverage must be made available if requested, such coverage is optional in Kentucky and may be waived by the insured. The coverage that must be made available, moreover, may be limited by terms and conditions not inconsistent with the remainder of KRS 304.39–320. Thus, while the statute serves the remedial purpose of protecting auto-accident victims from underinsured motorists who cannot adequately compensate them for their injuries, that purpose has not been raised to the level of a public policy overriding other purposes of the MVRA, such as guaranteeing the continued availability of affordable motor vehicle insurance, or overriding all other considerations of contract construction. KRS 304.39–010.
>
> Indeed, we have held that in statutes providing for optional vehicle coverages, the statutory allowance for "terms and conditions" permits reasonable exclusions from coverage. *Preferred Risk Mut. Ins. Co. v. Oliver,* 551 S.W.2d 574 (Ky.1977) (upholding motorcycle exclusion from uninsured motorist coverage and citing *Commercial Union Ins. Co. v. Delaney,* 550 S.W.2d 499 (Ky.1977)). In *Motorists Mut. Ins. Co. v. Glass,* 996 S.W.2d at 437, moreover, we held that a "regular use" exclusion from underinsured motorist coverage virtually identical to the exclusion in Hodgkiss–Warrick's policy was not unreasonable: "The validity of this exclusion was discussed at length by the Court of Appeals in *Windham v. Cunningham,* [902 S.W.2d 838 (Ky. App. 1995)] at 841. We agree with the Court of Appeals' analysis and with its conclusion that the exclusion is not against public policy." 996 S.W.2d

> at 450. Since *Glass*, the General Assembly has not amended the pertinent provisions of KRS 304.39–320, and the Court of Appeals has upheld regular use exclusions from UIM coverage on at least three occasions. *Burton v. Kentucky Farm Bureau Mut. Ins. Co.*, 326 S.W.3d 474 (Ky.App.2010); *Edwards v. Carlisle*, 179 S.W.3d 257 (Ky.App.2004); *Murphy v. Kentucky Farm Bureau*, 116 S.W.3d 500 (Ky.App.2002). ***Although the fact patterns of Windham, Glass and the subsequent Court of Appeals' cases differ somewhat from each other and from the present case, all but one of them, Edwards, involve claims by a household member injured in one household vehicle for UIM benefits provided under a policy or policies covering another or other household vehicles.[6] The gist of these cases is that it is not unreasonable or contrary to the MVRA to exclude UIM benefits in that situation, because otherwise household members would have an incentive to minimize their liability coverage in reliance on less expensive UIM coverage, and because otherwise the insurer is apt to be exposed to substantial risks it was not paid to underwrite.***

Id. at 881-82 (emphasis supplied) (footnote omitted).

Later in *Hodgkiss-Warrick*, this Court stated as follows:

> As noted above, and as noted in *Glass* and the related Court of Appeals cases, the MVRA evinces no similar policy mandating UIM coverage. It requires only that UIM coverage be made available and allows its availability to be made subject to reasonable terms and conditions. Even if, as Hodgkiss–Warrick argues, the regular use exclusion at issue here has much the same effect as would a family or household exclusion, it is not rendered invalid for that reason. This is so because the MVRA does not invalidate such clauses *per se*, but only such clauses as tend to defeat the Act's mandates, and the exclusion here, applicable to no more than a handful of the thousands of potentially underinsured vehicles to which Hodgkiss–Warrick might be exposed, clearly does not deprive her of meaningful UIM coverage.

Id. at 884.

In this case, the Court of Appeals determined that *Hodgkiss-Warrick* was inapplicable because the "regular use" exclusion in *Hodgkiss–Warrick* was different from the "owned but not scheduled for coverage" exclusion at issue herein and determined it to be against public policy, even though the "regular use" exclusion has been found to be enforceable and not against public policy. *See* Court of Appeals Opinion, Pages 7-8. However, the "regular use" exclusion in *Hodgkiss–Warrick* is exactly the same type of exclusion as the "owned but not scheduled for coverage" exclusion at issue in this case. Based on the Kentucky appellate decisions holding that

the "regular use" exclusion is enforceable and not against public policy, the Court of Appeals erred in finding the exclusion at issue herein was void as against public policy. The two exclusions have little practical difference.

II. The Court of Appeals Decision Allows Recovery of UIM Benefits for a Non-Covered Motorcycle and Conflicts with Other Court of Appeals Decisions on the Same Issue

The enforcement of exclusions for non-covered motorcycles from both UM and UIM coverage has been present in Kentucky law for many years. *See Preferred Risk Mut. Ins. Co. v. Oliver*, 551 S.W.2d 574 (Ky. 1977); *State Farm Mut. Ins. Co.v. Christian*, 555 S.W.2d 571 (Ky. 1977); *Baxter v. Safeco Ins. Company of America*, 46 S.W.3d 577 (Ky. App. 2001); *Motorists Mut. Ins. Co. v. Hartley*, No. 2010-CA-000202-MR (Ky. App. Feb 11, 2011); and *Larkin v. United Servs. Auto. Ass'n*, No. 2011-CA-000434-MR, 2011 WL 6260361, (Ky. App. Dec. 16, 2011). The involvement of a non-owned motorcycle is a significant consideration, but was seemingly ignored by the Court of Appeals in reaching its decision. The heightened risks inherent in the use of a motorcycle are common knowledge and have been discussed by Kentucky courts:

> Kentucky's courts recognize the significant risks inherent in use of a motorcycle which justify enforcement of coverage exclusions: It is common knowledge that motorcycle riders, as a class, are among the highest risk groups conceivable. Motorcycles offer no protection whatsoever from the front, back, sides or top, and leave the rider exposed to every peril of highway travel. The exclusion of such a class from coverage is clearly reasonable where, as here, the assured has the option of avoiding the excluded peril. An assured has no choice in selecting those uninsured motorists who may injure him, but he certainly does elect to ride a motorcycle. This volitional act triggers the exclusion and he accepts the consequences.

See Preferred Risk Mut. Ins. Co. v. Oliver, 551 S. W.2d 574, 577 (Ky. 1977). In *Baxter v. Safeco Ins. Company of America*, 46 S.W.3d 577 (Ky. App. 2001), the Court of Appeals held that it was "manifestly unfair" to require an insurance carrier, which did not write the policy for the motorcycle, to be held accountable for damages it could not have foreseen. *Id.* at 579. Many of

these decisions are premised on the Kentucky MVRA, which distinguishes between motorcycles and other vehicles, as the owners of all other motor vehicles must opt out of uninsured and underinsured coverage pursuant to KRS §304.20-020, but motorcycle owners must affirmatively opt in to all optional coverage pursuant to KRS §304.39-040. As a matter of public policy motorcycles are treated differently than other vehicles, and exclusion of non-covered owned or regularly available motorcycles from optional coverage has been upheld as consistent with public policy. Most recently, the "owned but not scheduled for coverage" issue herein was reviewed by the Kentucky Court of Appeals on two separate occasions and found to be valid and enforceable. *See Hartley* and *Larkin*.[1]

In this particular case, Tryon was operating a motorcycle that he owned and that was not insured with Philadelphia or Encompass. The Philadelphia and Encompass policies included an "owned but not scheduled for coverage" exclusion limiting the UIM coverage to the vehicles listed in their respective policies. The clear and unambiguous language of the policies of insurance states that it does not provide UIM coverage for Tryon while occupying his own motor vehicle that is not insured for UIM coverage under the respective Philadelphia and Encompass policies of insurance. The motorcycle was not insured for UIM with either carrier, and as a result the policies did not provide UIM coverage pursuant to the terms of the policy.

The language makes perfect sense and is significant from the standpoint of the insurer. The "owned but not scheduled for coverage" exclusion prohibits an insured from choosing to own, operate, and use a myriad number of vehicles, but only insure and pay a premium for one of those vehicles, and then apply the coverage from the one insured vehicle to all of the vehicles that were

[1] While those decisions were unpublished, the logic and legal reasoning contained therein and as well as in the progeny of cases discussed herein upholding the "owned or available for regular use" exclusion as a reasonable limitation on UIM coverage mandates reversal herein. These cases are cited herein pursuant to CR 76.24(4)(c).

not insured for coverage. When taken to its logical conclusion, under the decision of the Court of Appeals Tryon could own and use a fleet motorcycles insured with XYZ Insurance Company for liability only, but apply his UIM coverage from Philadelphia and Encompass without paying one penny of coverage related to his motorcycles or the heightened risk involved in their operation.[2]

This precise issue and concern were discussed by the Court of Appeals in *Larkin*. In that case, the plaintiff's decedent, who was riding a motorcycle, was killed in an accident with another vehicle. *Larkin* at *2. The decedent's estate claimed UIM coverage from USAA, which insured two of the decedent's vehicles, but not the motorcycle the decedent was operating at the time of the accident. *Id.* USAA denied the claim on the basis of policy provisions such as those now before the Court. *Id.* at *2-3. Suit was filed and USAA was subsequently granted summary judgment. *Id.* at *3. The Court of Appeals affirmed the summary judgment for the following reasons:

> Would it be reasonable for Larkin to operate an uninsured motor vehicle, and then expect entitlement to UIM benefits for damages arising from the operation of that uninsured vehicle? We think not, for a multiplicity of reasons. First, Larkin entered into an insurance contract which expressly excluded his entitlement to UIM benefits under the facts at bar, and the Appellants acknowledge that the policy so states. Second, it is uncontroverted that Larkins's motorcycle is not shown as a "covered auto," which is defined by the policy "[A]ny vehicle shown in the Declarations . . ." And third, if the Appellants' argument is taken to its logical conclusion, a person could insure a single vehicle with USAA and then operate a fleet of other uninsured vehicles for which USAA would be liable for UIM benefits despite not having assumed the risk nor received any premiums for those uninsured vehicles.

Id. at *4-5. The *Larkin* Court further instructed:

> In the matter at bar, the policy exclusion at issue is not only directly applicable to the instant facts, but does not run afoul of a public policy requiring that an insured receive what he reasonably expects his policy to provide. Larkin could not reasonably expect to receive UIM benefits on an uninsured vehicle which he owned, and one which was expressly excluded by the policy language. While Larkin was an insured, for the limited purpose of operating the 2007 Mercury

[2] "[T]he exclusion also addresses the fact that without it an insurer is apt to be exposed to substantial risks of which it was not apprised and for which it was paid no premium." Hodgkiss-Warrick, 413 S.W.3d at 885-886.

> Mountaineer and a 1993 GMC Sierra 1500 [insured by the USAA policy], he cannot reasonably be construed as an insured for purposes which exceed the policy language, or for all conceivable purposes.

Id. at *5-6.

Similarly, in *Hartley*, the plaintiff was riding a motorcycle and was involved in an accident with another vehicle. *Hartley* at *2. The plaintiff claimed UIM coverage from Motorists, which insured two of the plaintiff's vehicles, but not the motorcycle that he was operating at the time of the accident. *Id.* at *2. Motorists denied the claim, on the basis of policy provisions such as those now before the Court. *Id.* at *3-4. Suit was filed, but unlike *Larkin*, the trial court declared the exclusion unenforceable and granted summary judgment in favor of the plaintiff. *Id.* at *4. The Court of Appeals, in reversing in favor of Motorists and granting declaratory relief, stated:

> The exclusion in the Motorists policy unequivocally states that UIM coverage is not afforded for motor vehicles not covered under the policy. The declarations page of the policy lists the insured vehicles as the Expedition and the Frontier. The motorcycle involved in the accident is not listed as an insured motor vehicle. Thus, we fail to see how the exclusion could not be readily understood by the average person. The UIM coverage was dependent on the condition that Hartley's injury not arise from his use of a vehicle he owned but voluntarily chose not to list and pay premiums for under the Motorists policy.

Id. at *4-5.

In this case, the Court of Appeals relied upon *Chaffin v. Kentucky Farm Bureau Ins. Companies*, 789 S.W.2d 754 (Ky. 1990), stating that "[t]he Kentucky Supreme Court concluded that 'uninsured motorist coverage is personal to the insured; that an insured who pays separate premiums for multiple items of the same coverage has a reasonable expectation that such coverage will be afforded; and that it is contrary to public policy to deprive an insured of purchased coverage[.]'" (Court of Appeals Opinion, Page 4.) The Court of Appeals seemed to feel compelled to follow *perceived* precedent in making its decision and overruling the trial court herein; however, a separate panel of the Court of Appeals in *Hartley* analyzed the *Chaffin* decision as to why the

stacking decision therein was inapplicable to the "owned but not scheduled for coverage" exclusion present in *Hartley* and herein:

> Despite the unambiguous language in the exclusion, Hartley relies on *Chaffin v. Kentucky Farm Bureau Ins. Companies*, 789 S.W.2d 754 (Ky. 1990), where a similar uninsured motorists (UM) exclusion was ultimately held unenforceable based on public policy grounds. In doing so, in dicta, the Supreme Court described the provision as "nearly incapable of rational construction." *Id.* at 756. The Supreme Court did not elaborate its point but instead turned to the public policy reasons for invalidating the exclusion. We believe the Supreme Court's description of the provision must be read in its factual context. In *Chaffin*, the insured had three separate insurance policies issued by the same insurance company on three separate motor vehicles and each policy had UM coverage. Each of the three insurance policies provided uninsured motorist coverage of $25,000, and separate premiums were paid for each of the items of uninsured motorist coverage. *Id.* at 755. The issue was whether the insured could stack the units of UM coverage contained in the policies on the vehicles not involved in the accident. Thus, the Court indicated that the exclusion was ambiguous where the insured paid premiums for UM coverage for three vehicles, yet, under the insurance company's interpretation of the statute, the insured could only recover UM benefits under one policy. *Id.* at 756. Significantly, under the circumstances presented, the insurance company had accepted three separate UM premiums from Chaffin while only affording her one item of coverage by writing three separate policies. The exclusion in this case cannot be said to suffer the same ambiguity. Motorists did not issue separate insurance policies. It issued one policy that clearly excluded motor vehicles not listed as insured from UIM coverage, and Hartley explicitly rejected paying additional premiums for coverage for his motorcycles under the Motorists policy. Thus, the question is whether the "owned but not scheduled for coverage exclusion" in the Motorists policy is void as a matter of public policy.

Hartley at *5-6. The Court later reasoned:

> If we were to apply *Chaffin* to the present facts, Hartley would reap the benefit of the coverage he specifically rejected and for which he paid no premiums. In the context of mandatory liability coverage, this Court has previously recognized the potential windfall to an insured if an "owned but not scheduled for coverage" exclusion were not enforced
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> ...
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> To afford UIM coverage to Hartley, who did not pay premiums to Motorists for coverage of his motorcycles and who expressly rejected such coverage, would be contrary to public policy because the insurance companies would ultimately raise premiums on all consumers to reflect the increased risk. Although Hartley now

> regrets his decision to not include his motorcycles on the Motorists policy, it remains that the Motorists policy unambiguously precludes coverage.

Hartley at *10-11.

In this case, as in *Larkin* and *Hartley*, the policy expressly excluded the coverage that Tryon sought to recover because it explicitly, clearly, and unambiguously excluded UIM coverage on a vehicle owned by Tryon but not scheduled for coverage with Philadelphia or Encompass. Moreover, "[b]y not enforcing the exclusionary clause limiting UIM coverage to claims involving the vehicles covered by the policy, an insured who owns multiple vehicles can receive coverage on additional vehicles without paying an additional premium. We remain skeptical that such a result furthers a public purpose." *Hartley* at *7. The logic and rationale utilized in *Larkin*, *Hartley*, and *Hodgkiss-Warrick* is the correct analysis that is supported by Kentucky law and warrants reversal of the Court of Appeals herein.

III. The Doctrine of Reasonable Expectations is Not Applicable

The Court of Appeals' decision stated that "an insured who pays separate premiums for multiple items of the same coverage has a reasonable expectation that such coverage will be afforded." (Court of Appeals Opinion, Page 4). However, any argument that the Plaintiff had a "reasonable expectation" of coverage is misplaced as the policy language is not ambiguous. *See True v. Raines*, 99 S.W.3d 439 (Ky. 2003). The exclusionary language contained in both the Philadelphia and Encompass policy clearly states that the policy does not provide UIM coverage for any vehicle that was not insured for UIM under that policy. In this case, the motorcycle was not insured for UIM coverage under the Philadelphia or Encompass policy. The only vehicle insured for UIM coverage under the Philadelphia policy was a 1996 Pontiac Firebird and the only vehicle insured under the Encompass policy was 2004 Lexus. There is no ambiguity, and thus the reasonable expectation of the insured is not applicable.

Even so, Plaintiff cannot reasonably expect to have UIM coverage for the 2009 Yamaha Motorcycle when he did not purchase or pay any premium to Philadelphia or Encompass for UIM coverage when the policy specifically requires it for coverage to exist. That logic was discussed in *Larkin* and is applicable to Tryon herein,

> While [Tryon] was an insured, for the limited purpose of operating the [1996 Pontiac Firebird insured by the Philadelphia policy] and a [2004 Lexus insured by the Encompass], he cannot reasonably be construed as an insured for purposes which exceed the policy language, or for all conceivable purposes.

Larkin at *2. As a result, the reasonable expectation of Tryon is irrelevant, but even if it were not there would be no coverage provided under the exclusions.

CONCLUSION

For these reasons, Kentucky Defense Counsel, Inc. respectfully requests that this Court reverse the Court of Appeals decision in this case and render an opinion consistent with *Larkin*, *Hartley*, and *Hodgkiss-Warrick* that the "owned but not scheduled for coverage exclusion" herein is valid, enforceable, and not against public policy and reinstating the summary judgment of the trial court.

Respectfully submitted,

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